provides that "a claim arising from the rejection, under section 365 of this title ... of an executory contract ... of the debtor ... *shall be determined, and shall be allowed ... as if such claim had arisen before the date of the filing of the petition.*" The date of the overt act of rejection of the Warrant Agreement, which by definition will be some date post-petition, does not alter the fact that the Warrant Holders became a party to an executory contract susceptible to rejection immediately upon the commencement of Respondents' bankruptcy case any more than the overt act of rejection taking place post-petition could alter the fact that the rejection damages claim is still a prepetition, not post-petition claim.

Petitioners disregard these mandates of the Bankruptcy Code, crafting a novel argument to attempt to obviate the affect of federal bankruptcy law. Purportedly relying on New York state law, Petitioners argue not merely for some different methodology to determine damages as of the date proscribed by the Bankruptcy Code, but argue instead that New York state law trumps the Bankruptcy Code and requires a damages determination as of a wholly different date. Specifically, Petitioners argue that damages should be calculated as of a date some 300+ days after the date proscribed by § 502(g).

The laws of the states do indeed have their place in the determination of rejection damages claims. Reference to state law to determine a creditor's claim is appropriate, but only where federal bankruptcy law leaves a gap, and only where that state law does not conflict with federal bankruptcy law. Neither situation is present here. The Bankruptcy Code provides a clear answer and the Bankruptcy Code controls: a rejection damages claim must be both "determined" and "allowed" as if such claim had arisen on the date that is

immediately before the date of the filing of the petition pursuant to §§ 365 and 502 of the Bankruptcy Code. On this, courts throughout the circuits are in agreement and interjection into this settled area of law by this Court is unnecessary.

REASONS TO DENY THE PETITION

I. REVIEW BY THIS COURT IS NOT NECESSARY AS THERE IS NO UNRESOLVED QUESTION OF FEDERAL BANKRUPTCY LAW PRESENTED TO THIS COURT AND NO CONFLICT BETWEEN THE COURTS OF APPEALS AS TO THE PROPER APPLICATION OF §§ 365(g) AND 502(g).

There is no doubt that the calculation of rejection damages claims is indeed an important question of federal law. It is with Petitioners' description of this area of law as "unresolved," not as "important," with which Respondents disagree. This question is of such importance, in fact, that Congress deemed it prudent specifically to spell out in the text of the Bankruptcy Code the date from which a non-debtor party's damages claim must be determined and allowed.

A. There Is No Unresolved Question of Federal Bankruptcy Law Presented to this Court: The Plain Language of the Bankruptcy Code Answers the Question Presented

To state again that the language of the relevant sections of the Bankruptcy Code is clear and unambiguous borders on the redundant. However, under the circumstances where Petitioners have consistently acknowledged yet refused to apply that language, redundancy is necessary. Per the express language of § 365(g)(1), upon rejection of an executory

contract, the time of breach is fixed as the day "immediately before the date of the filing of the petition." Respondents' bankruptcy petitions were filed on July 31, 2002. The breach of the Warrant Agreement thus occurred on July 30, 2002. The bankruptcy court so found. (Pet. App. 43a.) The district court so found. (Pet. App. 20a.) The court of appeals so found. Pet. App. 8a.

Similarly, per the express language of § 502(g), a claim arising from rejection of an executory contract shall be "determined, and shall be allowed ... as if such claim had arisen before the date of the filing of the petition."[1] Despite Petitioners' admission that § 502(g) fixes the date for determination of a rejection damages claim (Petition for Writ, p. 3), Petitioners nonetheless attempt to avoid the plain meaning of the statute. Petitioners' argument for a damages calculation as of a wholly different date ignores the plain meaning of the statute and impermissibly renders meaningless key provisions of § 502(g).[2]

Interestingly, Petitioners are willing to give effect to the portion of § 502(g) that states that a rejection damages claim "shall be ***allowed*** ... as if such claim had arisen before the date of the filing of the petition," citing the legislative history and conceding that the Warrant Holders' claim is a prepetition unsecured claim. However, the relentless focus on the verb "allowed" to argue that this is the *sole* effect of § 502(g) completely ignores the immediately preceding language of that same phrase of the statute which says that such claim also "***shall be determined*** ... as if such claim had arisen before the

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[1] *See, e.g.*, cases cited *infra* note 7.

[2] *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-242 (1989).

date of the filing of the petition."[3] Read in its entirety, this sentence actually contains a compound verb, requiring two separate actions: not only ***allowance***, but also ***determination*** of a rejection damages claim - both "as if such claim had arisen before the date of the filing of the petition." Any other interpretation ignores the plain meaning of the statute and renders a portion of the language of § 502(g) superfluous. Such interpretation is therefore contrary to the rules of statutory construction.[4] The court of appeals specifically so found citing centuries of precedent from this Court. Pet. App. 9a.

Finally, in an effort to gloss over the fact that the New York state law of which they seek application is in direct contradiction to the mandate of § 502(g),[5] Petitioners cite to cases concerning lessor rejection claims and state law requirements for mitigation. Petitioners argue that "the court of appeals' interpretation of [the word "determine" in] 11 U.S.C. § 502(g) would preclude courts from considering mitigation in determining rejection damages."[6] Petition for Writ, p. 24. The numerous cases cited by Petitioners wherein

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[3] In a related context, this Court previously observed "[w]hile the Board insists that § 365(g)(1) deals only with priorities of payment, the implications from the decided cases are that the relation back of contract rejection to the filing of the petition in bankruptcy involves more than just priority of claims." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984).

[4] *Ron Pair*, 489 U.S. at 241-242.

[5] *See* detailed discussion below p. 23.

[6] Petitioners' use of the verb "determining" here is somewhat ironic under the circumstances.

a lessor's duty to mitigate damages per state law is upheld by bankruptcy courts and applied to a calculation of rejection damages are inapposite to the issue presented. The lessor cases requiring a duty to mitigate are of no merit to Petitioners' argument: none of those cases stand for the proposition that state law can trump the date on which the Bankruptcy Code mandates that rejection damages be calculated. Stated differently, § 502(b)(6) (in a strikingly similar fashion to § 502(g)) clearly states that a bankruptcy court is required to determine a lessor's claim for damages resulting from the termination of a lease of real property "*as of the date of the filing of the petition.*"

Those cases speak to *how*, not *when* the damages calculation must be made. A bankruptcy court will indeed look to state law in its determination of damages when state law does not conflict with the Bankruptcy Code. Since none of the laws of the several states requiring post-tenant-breach mitigation by a lessor conflict with the Bankruptcy Code's requirement that a lessor's rejection damage claim is calculated as of the date of the filing of the petition, that situation is qualitatively different than that presented here. Here, should Petitioners' argument be accepted, it would allow New York state law as to *when* damages should be calculated to trump a specific mandate of the Bankruptcy Code and would turn preemption on its head.

Continuing with the lessor example, the Bankruptcy Code does not tell a court *how* to "determine the amount of [a lessor of a rejected lease's] claim in lawful currency of the United States," thus it is entirely appropriate to look to state law to see how a state, absent bankruptcy, would calculate such a claim and it is entirely appropriate to take into account a lessor's state law mitigation obligation in that claim determination. There is nothing inconsistent with this method

of claim determination and the Bankruptcy Code's preemption of state law as to the relevant date for such determination. At times the result of using the day before the petition for the determination of damages may lead to a harsh result but that will not always be the case. The important thing is that the date of determination will always be consistent as the Bankruptcy Code is abundantly clear as to *the date on which* the damages must be calculated. Petitioners' attempts to draw attention away from this central fact by repeatedly arguing for consideration of "post-petition events" is a red herring.

In response to this precise argument below, the district court held that "[i]mportantly, these [lessor] cases do not dispute the rule found in §§ 365(g)(1) and 502(g) that a contract is breached, for purposes of considering claims for rejected contracts, as of the date immediately prior to filing the petition." Pet. App. 23a. The import of the lessor cases, with their recognition of a lessor's mitigation requirements under state law, is that they fill in the gaps left by bankruptcy law "by providing guidance as to whether there is any merit to the damages claims and how much they are worth." Pet. App. 23a. State law can fill in a gap in bankruptcy law where the Bankruptcy Code fails to state ***how*** a claim is "determined" and how to decide how much that claim is worth (ie: whether a lessor has adequately fulfilled its state law mitigation obligation), but state law cannot trump the Bankruptcy Code and dictate ***the date on which*** a claim is "determined" when the Bankruptcy Code specifically sets that date via § 502(g) and there is no gap to fill. The language of the Bankruptcy Code is clear and unambiguous, thus there is no unanswered question of federal law for this Court's consideration.

B. Uniformity Exists in Caselaw Across the Circuits that the Plain Language of §§ 365(g) and 502(g) Mandate a Calculation of Rejection Damages as of the Date Immediately Prior to the Petition Date

As the court of appeals recognized, courts of every level across the circuits have held that rejection damages claims must be calculated as of the date immediately before the date of the filing of the petition.[7] Given the plain language of the

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[7] *See, e.g., In re Malden Mills Indus., Inc.*, 303 B.R. 688 (1st Cir. 2004)(consistent with § 365(g), § 502(g) of the Bankruptcy Code provides that claims resulting from the rejection of an unexpired lease relate back to the date of the filing of the petition); *Miller v. Communities, Inc. (In re Miller)*, 282 F.3d 874, 878 (6th Cir. 2002)(finding any claim arising from breach of an executory contract is deemed to have arisen prepetition); *Addison v. Langston (In re Brints Cotton Mktg., Inc.)*, 737 F.2d 1338, 1342 (5th Cir. 1984) (chapter 7 trustee holding cotton "call contracts" could reject as executory and bankruptcy court did not abuse its discretion in valuing claims for purposes of estimation of claims under section 502(c) as of the petition date); *In re Cochise College Park, Inc.*, 703 F.2d 1339, 1353 & n.13 (9th Cir. 1983) (rejection claim is allowed in the amount which would be recoverable by the non-breaching party as of the petition); *Workman v. Harrison*, 282 F.2d 693, 696, 699 (10th Cir. 1960) (rejection of executory investment contract gives rise to claim for damages in amount of value of the contract at date petition was filed); *In re O.P.M. Leasing Servs., Inc.*, 79 B.R. 161, 165 (S.D.N.Y. 1987)(when an executory contract is rejected, the claim for damages is fixed as of the petition date so that once the amount of the damages owing to rejection is determined, it must be discounted to its present value as of the petition date); *In re Kent*, 91 B.R. 1, 3 (Bankr. E.D.N.Y. 1988) (damages are "precisely those he could claim if his contract had been breached the day before the petition was filed."); *In re Al Besade*, 76 B.R. 845, 847-48 (Bankr. M.D. Fla. 1987)(damages

statute, the consistency of these holdings is no surprise. Either the language of § 502(g) means what it says or it doesn't. Either the plain language of the statute will be given effect or it won't. Courts across the circuits have uniformly held that it does and it should; the plain language of § 502(g) mandates that rejection damages claims shall be "determined, and shall be allowed ... as if such claim had arisen before the date of the filing of the petition."

C. The Court of Appeals' Decision Does Not Conflict with the Law of the Fifth Circuit

Petitioners cite to the case of *Air Line Pilots Association, International v. Continental Airlines, Inc. (In re Continental Airlines Corp.)*, 901 F.2d 1259 (5th Cir. 1990) for the proposition that courts can and should consider "post-petition events" in determining the damages claims due to employees stemming from the rejection of a collective bargaining agreement ("CBA"). In articulating their view of how the court of appeals' decision below conflicts with the holding of *Continental*, Petitioners state that "[t]he court of appeals decision stands for the principle that §§ 365(g)(1) and 502(g) preclude the consideration of post-petition events from the calculation of rejection damages." Petition for Writ, p. 15. This statement oversimplifies and misstates the court of appeals' holding.

In *Continental*, the court framed the question before it as whether employees to a rejected CBA were entitled to future wages and benefits as contract rejection damages. Upon rejection of the CBA, numerous of the employees went on strike and also filed rejection damages claims for full wages

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should be fixed on the day before bankruptcy filing).

and benefits prospectively due to them under the rejected labor contracts in the hundreds of millions of dollars. First of all, the Fifth Circuit reiterated the law that upon rejection the CBA was "deemed breached the day before the Chapter 11 petition was filed[,] ... [and] [s]ection 502(g) provides a remedy for this breach in lieu of the labor law remedies which would have been available outside bankruptcy."[8] To determine whether there was any merit to the damages claims and to determine how much those claims were worth, the Court observed that under the NLRA, "[u]nless a collective bargaining agreement guarantees future employment, lost future wages and benefits as damages for its breach are not recoverable in periods when no work would have been available," and "[l]ikewise, employees working under such an agreement are not entitled to lost future wages if the employer ceases operations."[9] This inquiry was entirely appropriate - the court was looking to otherwise applicable law to determine what kind of damages were available to the employees.[10]

The court then undertook an analysis of (1) the fact that the contract did not guarantee employment and therefore damages under the NLRA were only available for the time the debtor would have been able to continue in business and (2) that since no damages would have been available to the employees for the time they were on strike outside of bankruptcy, same were not allowable as a claim. The court

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[8] *Continental Airlines*, 901 F.2d at 1264.

[9] *Continental Airlines*, 901 F.2d at 1264.

[10] It should be noted, however, that neither of those inquiries is relevant to *when* rejection damages should be determined, just the allowable components of the calculation itself.

thus established the outer limits of the employee's allowable claims without conflict with § 502(g) as none of the cited claim components per the NLRA altered § 502(g)'s mandate as to *when* rejection damages should be calculated.

Calculating the potentially allowable amount of the claim in accordance with the NLRA is not a temporal inquiry; the parameters and components of the NLRA regarding for what an employee was or was not entitled to compensation did not rise and fall based on any post-petition event. Those parameters were what they were as of the day Continental filed for bankruptcy. The court simply assessed the components of the rejection damages claim and accounted for that which the NLRA would and would not allow and remanded the case to the bankruptcy court to determine and allow the rejection damages claim pursuant to § 502(g) with no suggestion that a calculation as of any date other than the date immediately prior to the petition date was appropriate.

The *Continental* court's analysis is not dissimilar to what a court would do to determine damages incident to the rejection of a more traditional employment contract. In that circumstance, courts are required under the Bankruptcy Code to take a look at an employment contract and examine an employee's compensation available thereunder for one year when setting a claim for damages arising from the rejection of that employment contract pursuant to § 502(b)(7). Specifically, under § 502(b)(7), courts are required to ascertain the "compensation provided by such contract" (pursuant to § 502(b)(7)(A)) and "any unpaid compensation

due under such contract" (pursuant to § 502(b)(7)(B)) to calculate the rejection damages claim.[11]

This is analogous to what the court in *Continental* did; as in a "regular" employment contract rejection situation, the *Continental* court determined what compensation the employees were entitled to under the CBA as governed by the NLRA. The *Continental* court looked first to the text of the CBA (to determine that there was no guarantee of employment) and to the NLRA (to determine the effect of the lack of guarantee and the effect of the employee's strike) to ascertain whether there was any merit to the employees' damage claims and to determine how much those claims were worth. Nothing in *Continental* suggests that rejection damages claims should be calculated on a post-petition date as is requested by the Petitioners.

Finally, more recent cases from the Fifth Circuit also belie Petitioners' argument that any conflict exists between the

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[11] Read in its entirety, § 502(b)(7) states that a court "shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount except to the extent that –

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds –

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of –

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates[.]"

court of appeals holding and the law in that circuit.[12] The decision of the court of appeals below does not conflict with the *Continental* decision or the law of the Fifth Circuit.

D. The Court of Appeals' Decision Does Not Conflict with the Law of the First Circuit

Petitioners next make the argument, allegedly pursuant to the case of *In re Good Hope Chem. Corp.*, 747 F.2d 806 (1st Cir. 1984), that notwithstanding the "relation back rule" codified in § 365(g) which sets the date of breach as the date "immediately before the date of the filing of the petition," courts are free to set a different date for calculation of the rejection damages claim arising from that breach. This argument fails for a myriad of reasons.

First of all, Petitioners argue that the First Circuit held that it was not mandatory that "the petition date be considered the breach date for all purposes." Petition for Writ, p. 18. This statement, if true, would fly in the face of not only the language of the Bankruptcy Code but decades of caselaw. Courts are not free to "consider" what the breach date is or

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[12] *See, e.g., Matter of Austin Development Co.*, 19 F.3d 1077, 1082 (5th Cir. 1994)("Consistent with this interpretation [of § 365(g)], § 502(g) permits the creditor on a rejected lease or executory contract to assert a claim for damages *as of the date of bankruptcy*[.]")(emphasis added); *In re Independent American Real Estate, Inc.*, 146 B.R. 546, 553 (Bankr. N.D. Tex. 1992)("Under the Bankruptcy Code, a rejection gives rise to a legal fiction that a breach of the contract occurred immediately prior to the filing of the petition ... Thus, a claim is allowable for those damages resulting from the breach, and the Court will determine the amount and validity of the claim as of the date of the breach.")(citations omitted).

ought to be depending on the circumstances. Per § 365(g), there is but one date that marks one breach upon rejection, the date that is immediately before the date of the filing of the petition. Secondly, Petitioners gloss over the unique factual context in which *Good Hope* was decided. The central issue with which the First Circuit was concerned was what date should be used to determine the exchange rate to quantify a claim against a debtor arising from rejection of a contract under which payment was to be made in German Marks. The *Good Hope* court was asked to determine which exchange rate to apply: (a) the rate in effect on the date supplied by the "breach day rule," providing for calculation of damages per the conversion rate in effect on the date of the breach; or (b) the rate in effect on the "judgment day rule," providing for calculation of damages per the conversion rate in effect on the date of the entry of the judgment. The difference in the exchange rate between the breach date and the judgment date was significant, and the affect on the creditor's claim was substantial.

Ultimately, the *Good Hope* court applied the "breach day rule" and determined that the claim should be calculated using the exchange rate in effect on the date of the breach. In so holding, the *Good Hope* court actually rendered the first part of a ruling that should have ultimately been consistent with the Bankruptcy Act. The court recognized that § 103(c) of the Bankruptcy Act clearly established the date of breach upon rejection of an executory contract: "rejection of an executory contract or unexpired lease, as provided in this Act, shall constitute a breach of such contract or lease as of the date of the filing of the petition initiating a proceeding under this Act." However, instead of holding (1) damages should be calculated using the exchange rate in effect on the date of the breach, and then (2) fixing the date of breach as the date set forth in § 103(c) of the Bankruptcy Act, the court quite simply

ignored the language of the Bankruptcy Act and manipulated the date of the breach to a later, post-petition date with a more favorable exchange rate.

Whatever the explanation for the ruling in *Good Hope*, be it misguided notions of equity, international comity, or whether it is, in the vernacular, just a case of "bad facts make bad law," Respondents respectfully state that the decision was in error. The decision was irreconcilable when rendered with the plain language of § 103(c) of the Bankruptcy Act and, in any event, is utterly irreconcilable with § 365(g), § 502(g) and the current state of the law across the circuits under the current Bankruptcy Code.

Finally, the precedential or persuasive effect of *Good Hope* (as interpreted by Petitioners) on this or any other court in or outside of the First Circuit must be seriously questioned. The First Circuit Court of Appeals recently reaffirmed that the law in the First Circuit with regard to the date of the breach of an executory contract and the date for calculation of a rejection damages claim is the same as the law in every other circuit:

> Consistent with § 365(g), § 502(g) of the Bankruptcy Code provides that claims resulting from the rejection of an unexpired lease relate back to the date of the filing of the petition. *Mason v. Official Comm. of Unsecured Creditors (In re FBI Distrib. Corp.)*, 330 F.3d 36, 42 (1st Cir.2003) ("If the contract is rejected ..., the contract is deemed breached on the date 'immediately before the date of the filing of the petition,'11 U.S.C. § 365(g)(1), and the nondebtor party has a prepetition general unsecured claim for breach of contract damages, one not entitled to administrative priority, 11 U.S.C. § 502(g)."). Under

> the statute, postpetition rejection fixes the liability of the debtor and, therefore, the recovery of the creditor, as of the petition date. Lawrence P. King, *Collier on Bankruptcy* ¶ 502.08[1].[13]

The decision of the court of appeals does not conflict, in principle or otherwise, with the current state of the law in the First Circuit.

II. THE COURT OF APPEALS' DECISION IS NOT ERRONEOUS

A. The Court of Appeal's Application of the Bankruptcy Code Is Consistent with the Plain Language, History and Purpose of-§§ 365(g) and 502(g)

As stated throughout this Response, the relief sought by Petitioners is a determination by this Court that the court of appeals erred in applying federal bankruptcy law instead of conflicting state law to determine a rejection damages claim that can arise only in a bankruptcy case. Notwithstanding the clear language of § 502(g), Petitioners opine that New York state law, not the Bankruptcy Code, should be applied to establish the date from which to calculate their damages arising from rejection of the Warrant Agreement. In an effort to create the appearance that a conflict among the circuits exists with regard to whether § 502(g) controls in the face of contravening state law, Petitioners omit any substantive discussion of the effect of the actual New York law they wish to have applied, ignore the fact that the relief they request is directly at odds with the express language of the Bankruptcy

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[13] *In re Malden Mills Indus., Inc.*, 303 B.R. 688 (1st Cir. 2004).

Code, and instead frame the alleged issue in terms of the rather esoteric question of a bankruptcy court's ability to "consider post-petition events" in its calculation of claims.

It is not, however, consideration of some monumental "post-petition event" that Petitioners seek. What Petitioners want is really quite simple: a calculation of their rejection damages claim on July 11, 2003 instead of July 30, 2002, the date immediately prior to the petition date. Petitioners are not requesting that some post-petition event be "factored in," so to speak, to a calculation done as of July 30, 2002, they wish to disregard completely any calculation of rejection damages done as of July 30, 2002 and instead calculate damages 300+ days hence. None of the cases cited by Petitioners throughout their Petition for Writ stand for this proposition.

Petitioners' citation to the legislative history of §§ 365(g) and 502(g) are also of no consequence to the question presented. The legislative history of § 502(g) does indeed support the truism that a rejection damages claim is a prepetition unsecured claim, a concept that is neither novel nor in dispute. However, Petitioners' real argument with regard to the legislative history of these statutes is as follows:

> There is no indication in the history and purpose of these provisions that they are intended to establish a date certain for the valuation of rejection damages or to preempt state law to the extent that state law would look to post-petition events in the determination of rejection damages. Petition for Writ, p. 21.

This statement both ignores the plain language of § 502(g) and, again, attempts to obscure the relief Petitioners actually seek.

First of all, it is unnecessary to resort to an examination of the legislative history of a statute when the language of that statute is plain and unambiguous. An observation about what the history of § 502(g) does not say is nonsensical in light of what the plain language of the statute itself says. Secondly, as noted throughout this Response, the relief actually sought by Petitioners is not (as repeatedly urged by them) some general notion that the occurrence of post-petition events ought to be considered in the determination of rejection damages claims. As recognized by the court of appeals, the relief actually sought by Petitioners is a ruling that "contract rejection damages must be determined under state law, in this case the law of New York, and not the Bankruptcy Code." Pet. App. 13a. Plainly said, Petitioners do not like the claim they receive when rejection damages are calculated as of July 30, 2002 so they turn to New York state law to argue for a bigger claim calculated as of an entirely different date seeking to reap the rewards of Respondents' successful reorganization and post-petition economic success. Any argument that the court of appeals' decision is inconsistent with the plain language, history or purpose of the Bankruptcy Code is specious.

B. The Court of Appeals Decision Is Not Otherwise Erroneous

First, in an effort to read the word "determined" either out of § 502(g) altogether or to have it construed to mean something other than its commonsense meaning, Petitioners advance the argument that the language of § 502(g) does not fix a date certain from which rejection damages claims should be calculated. Thus, argue Petitioners, § 502(g) merely "places rejection claims within a particular period, namely the period prior to the filing of the bankruptcy petition." Petition for Writ, p. 23. Respondents would point out first that this

argument, if accepted, would render in error decades of jurisprudence by courts across this country who, in conjunction with § 365(g)'s establishment of the date of breach, have specifically pinpointed the date immediately prior to the petition date as the date for calculation of rejection damages.[14] Further, as noted by Petitioners, statutes must be construed in a way as to avoid absurdity.[15] Respondents filed their bankruptcy petitions on July 31, 2002. Under Petitioners' interpretation of § 502(g), the entire year 2001 or, for that matter, the entire decade of the 1990's, falls within Petitioners' definition of "the period prior to the filing of the bankruptcy petition" and any date falling anywhere therein would be equally applicable as the date from which rejection claims could be calculated. Of course, the statute has been applied by courts in a way so as to avoid this absurd result.

Petitioners next quarrel with both the court of appeals' consultation of an "on-line dictionary" and with the court of appeals' selection of one of several alternative definitions of "determine." Initially, Respondents would note that citation to a dictionary, particularly Webster's dictionary (online via www.m-w.com), as an authoritative source on the plain meaning of a word is neither novel nor deserving of reproach. Indeed, this Court has itself cited to definitions in Webster's dictionary (in online or hard copy form) as the source for the plain meaning of a word in excess of three hundred (300) times over the past century of its jurisprudence. Further, each of the several definitions of "determine" as defined by

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[14] *See, e.g.*, footnote 7.

[15] *See* Petition for Writ, p. 24, citing *Sorrells v. United States*, 287 U.S. 435 (1932)(quotation omitted).

Webster's supports the court of appeals' ultimate conclusion. Whether defined as "to fix conclusively or authoritatively," "to decide by judicial sentence," "to settle or decide by choice of alternatives or possibilities," "to fix the form, position or character of beforehand," "to bring about as a result," "to limit in extent or scope," "to put or set an end to," "to find out or come to a decision about by investigation, reasoning or calculation," or, as by the court of appeals, "to fix the boundaries of," it cannot seriously be disputed that the word "determine" means to decide, settle, fix or calculate.[16] Thus, § 502(g) calls for a rejection damages claim to be decided, settled, fixed, calculated or "determined" as of the date prior to the petition date.

Finally, we turn to the crux of why the court of appeals' decision is not erroneous and why Petitioners' requested relief must fail: preemption. As framed by the district court and the court of appeals below, respectively, the relief Petitioners actually seek is a ruling "that the damages arising from the rejection of an executory contract should be determined by state law," and that "rejection damages must be determined under state law, in this case the law of New York, and not the Bankruptcy Code." Pet. App. 17a and 13a. Thus more accurately stated, the question presented to this Court is, when federal bankruptcy and state law conflict, what is the appropriate date for determining damages stemming from rejection of an executory contract, that proscribed by § 502(g) or that set forth in New York state law which directly contradicts the date set forth in the Bankruptcy Code?

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[16] All quoted definitions are taken from http://www.m-w.com/dictionary/determine.

Faced with a conflict between federal bankruptcy law and state law and the "choice" of which of the two conflicting laws to apply, the federal bankruptcy laws must prevail. This Court has consistently recognized and embraced the concept of preemption and the supremacy of the federal bankruptcy laws. In *Butner*, while recognizing that creditors' entitlements to a claim generally arise in the first instance from underlying substantive law, this Court nonetheless prefaced that holding with the qualifier "[u]nless some federal interest requires a different result ..." and further held that "to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress," state laws are "suspended."[17] Further, this Court in *Raleigh* stated that creditors' claims arising from substantive state law are "subject to any qualifying or contrary provisions of the Bankruptcy Code."[18] On the one hand, Petitioners cite to these precedents specifically recognizing that in the event of a conflict between state and federal bankruptcy law federal bankruptcy law will control, but then go on to disregard the same despite the obvious actual conflict between § 502(g) and the New York state law they would have this Court apply.

The protections of the Bankruptcy Code often drastically alter the rights of parties as they would otherwise exist under state law outside the Chapter 11 context. Valid property interests created by state law routinely give way to the rehabilitative and equitable goals of the Bankruptcy Code. Debtors have the power under the bankruptcy laws to take

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[17] *Butner v. United States, et al.*, 440 U.S. 48, 54-55 (1979).

[18] *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000).

many actions unheard of outside the world of Chapter 11.[19] And, as here, Chapter 11 debtors can escape burdensome contractual obligations by outright rejection of an otherwise binding legal contract, fixing and/or capping the damages claim resulting from that rejection in a way that is not contemplated in the non-bankruptcy context.[20] In sum, there is nothing novel about the supremacy of federal bankruptcy law over the property rights created by state law.

This is not to suggest that state law is ignored by bankruptcy courts, it isn't. Yet, "while state law ordinarily determines what claims of creditors are valid and subsisting obligations, a bankruptcy court is entitled (if authorized by the federal bankruptcy statute) to determine how and what claims are allowable for bankruptcy purposes[.]"[21] Therefore, in the calculation of a damages claim upon rejection of an executory contract, the measurement of damages may be determined by

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[19] *See, e.g.* 11 U.S.C. § 544; 11 U.S.C. § 545 (power to avoid admittedly valid liens by a debtor in possession or a trustee); 11 U.S.C. § 502 (power to void interest that would otherwise be due and payable under a binding contract); 11 U.S.C. § 365 (equitable remedies such as specific performance available under state law to the non-breaching party upon breach of a valid contract can be sharply curtailed or nonexistent); 11 U.S.C. § 547 (funds legally paid to a creditor prepetition can be recovered postpetition); 11 U.S.C. § 548 (sales and other consummated business transactions are revisited and sometimes avoided).

[20] *See e.g.* 11 U.S.C. § 365(a) (providing generally for the rejection of executory contracts and unexpired leases); 11 U.S.C. § 502(b)(6) (capping damages claims arising from rejection of a lease of real property); 11 U.S.C. § 502(b)(7) (capping damages claims arising from rejection of an employment contract).

[21] *Brints Cotton Mktg.*, 737 F.2d at 1341.

applying relevant state law, but only if that state law is not inconsistent with federal bankruptcy policy.[22] "[T]he bankruptcy courts, as courts of the United States, have power to supercede state law where it conflicts with the federal bankruptcy law which the court is primarily bound to enforce."[23]

Thus, assuming arguendo that New York state law does provide a different date for calculation of rejection damages, when that date is in direct contravention to the express language of §§ 365(g) and 502(g) of the Bankruptcy Code, it cannot control. *Butner* clearly states that, to the extent of actual conflict with the Bankruptcy Code, state laws are suspended.[24] If New York law says to look at the date the Petitioners "learned of the breach" as the date from which to calculate rejection damages, which date is by definition some date post-petition and is purportedly a date which is 300+ days post-petition under these facts, and the Bankruptcy Code says rejection damages shall be determined as of the date immediately prior to the petition date, Respondents respectfully suggest that the conflict between the two could not be more clear and "actual." With no disrespect to the laws of the several states, federal bankruptcy law and policy preempt any contravening state law to (a) fix the date of breach as the date immediately before the date of the filing of the petition; and (b) provide that any claim arising from that

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[22] *See Ohio v. Collins (In re Madeline Marie Nursing Homes)*, 694 F.2d 433, 436-37 (6th Cir. 1982); *Dunkley v. Rega Properties, Ltd. (In re Rega Properties, Ltd.)*, 894 F.2d 1136, 1139 (9th Cir. 1990).

[23] *Madeline Marie Nursing Homes*, 694 F.2d at 436-37.

[24] *See Butner*, 440 U.S. at 54 n.9 (citations omitted).

rejection shall also be determined as of that date. Application of these incontrovertible legal principles here yields July 30, 2002 as the date of breach and the only date from which to calculate Petitioners' rejection damages claim.

As articulated by the district court below on the issue of preemption and the supremacy of the federal bankruptcy laws in the areas specifically addressed thereby:

> bankruptcy law establishes the parameters for allowing contract rejection claims – for example, that they be treated as unsecured pre-petition claims and that breach is deemed to occur immediately prior to the petition date – and that state law fills in the gaps – notably, by providing guidance as to whether there is any merit to the damages claims and how much they are worth. Pet. App. 23a.

Thus conceptualized, it becomes clear that when "courts state that the contract rejection damages are determined under state law, they mean that they will look to state law to fill in what federal bankruptcy law leaves out regarding such issues as whether money damages can be recovered at all, the amount of damages, and how issues of bad faith affect the amount of damages." Pet. App. 13a-14a and 22a. When the Bankruptcy Code leaves a gap, state law is relegated to the role of gap-filler to speak where the Bankruptcy Code does not. However, as the courts below each held, "[c]learly, the Code did not leave out the important question of when, in the context of a rejected contract in bankruptcy, a breach is deemed to occur. *See* 11 U.S.C. § 502(g)" and "the Bankruptcy Code specifically provides that any claim arising from a rejection shall be 'determined' as if such claim had arisen before the date of the filing of the bankruptcy petition." Pet. App. 23a and 14a. No unanswered question and no gap

means no need to resort to state law; §§ 365(g)(1) and 502(g) tell a court all it needs to know to decide from when to determine a rejection damages claim.

CONCLUSION

Many appeals to this Court undoubtedly present complex issues requiring the interpretation of vague statutory language, examination of convoluted legislative history, and something akin to telepathy to derive Congressional intent. Such is not the situation in the case at bar. Respondents' argument against granting the Petition for Writ is based on the plain language of the Bankruptcy Code and is unusually straightforward. The court of appeals correctly determined (per the mandate of § 365(g)) that the date of the breach of the Warrant Agreement was the date immediately prior to the Petition Date, July 30, 2002, and that this date (per the mandate of § 502(g)), was the date on which the Warrant Holders' rejection damages claim arose and should be determined and allowed. For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

Frank J. Wright
Counsel of Record
C. Ashley Ellis
Hance, Scarborough, Wright,
Ginsberg & Brusilow, LLP
14755 Preston Road
Suite 600
Dallas, TX 75254
(972) 788-1600